

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

CRIMINAL NO. 16-cr-20211

Plaintiff,

HON. GEORGE CARAM STEEH

v.

D-1 JOSETTE BUENDIA,

Defendant.

GOVERNMENT'S SENTENCING MEMORANDUM

The United States of America, by and through its attorneys, Daniel L. Lemisch, Acting United States Attorney, and Frances Lee Carlson and J. Michael Buckley, Assistant United States Attorneys, submits that a sentence of 63 months' imprisonment is sufficient but not greater than necessary to achieve the purposes set forth in 18 U.S.C. § 3553(a)(2). This sentence will send a clear message that corruption at the expense of Detroit's schoolchildren will not be tolerated and will be met with serious consequences.

I. FACTUAL AND PROCEDURAL HISTORY

A. Convictions

On December 9, 2016, after a three-day trial, a jury found defendant Josette Buendia guilty of one count of conspiracy to commit federal program bribery, in violation of 18 U.S.C. §§ 371 and 666(a)(1)(B), and two counts of federal program bribery in violation of 18 U.S.C. § 666(a)(1)(B). Buendia is scheduled to be sentenced on June 1, 2017.

B. Defendant's Corrupt Conspiracy (Count 1)

Defendant Josette Buendia was employed by Detroit Public Schools (“DPS”) as the principal of Bennett Elementary School (“Bennett”) from 2010 through 2016. DPS maintained a list of pre-approved vendors that were authorized to do business with DPS. In her role as principal, Buendia had the discretion to select vendors from DPS’ vendor list to procure services and supplies for Bennett. Buendia was ultimately responsible for certifying, or causing to be certified, that all goods and services were received by DPS, which in turn, would cause DPS to issue payment to the vendor. DPS had policies and procedures regarding ordering services and supplies to ensure that DPS money was being spent efficiently and without impropriety or even the appearance of impropriety:

It is essential that the functions of pricing and supplier/contractor selection be carried out objectively and ethically. Therefore:

1. Employees who are not authorized to negotiate purchases will not indicate district preference to suppliers/contractors for any product or service or source of supply.
2. Employees who are in a position to recommend purchases and services and sources of supply and/or negotiate with suppliers and contractors will not:
 - a. Solicit or accept gifts, gratuities, loans, or favors from present or prospective suppliers/contractors.

(Govt. Trial Exhibit 6, DPS Policy 5.22 regarding Vendor Relations.)

The overall purpose of the procurement process is to ensure that DPS obtains the highest quality goods and services with minimum lead-time, and at the best overall value. To that end, all procurement transactions will be conducted in a manner to avoid impropriety or even the appearance of impropriety, and all goods and services will be competitively procured as required by law and this manual.

(Govt. Trial Exhibit 7, DPS Office of Procurement and Logistics Policy Manual.)

Norman Shy, doing business as Allstate Sales, Ronan Enterprises, and R.S. Associates, was a DPS vendor of school supplies. Sometime prior to May 2011, Buendia began using Shy as a vendor for Bennett. But, instead of acting according to DPS policy, Buendia chose Shy as a vendor for Bennett, influenced by the fact that she would receive prepaid gift cards from him. In exchange for the gift cards, Buendia manipulated the procurement process using her authority as principal of Bennett. She submitted and/or approved requisitions that included goods she knew Shy would not actually deliver to Bennett. She also knowingly indicated that Bennett received all goods listed on certain purchase orders when they in fact were not delivered. Buendia's corrupt actions thereby caused DPS to issue payment to

Shy for undelivered goods thereby robbing Bennett of desperately needed supplies and DPS as a whole of scarce funds. Buendia, on the other hand, received the benefit of her corrupt acts. She received a “credit” with Shy based on a percentage of the fraudulently obtained payments Shy received from DPS for undelivered goods. Shy maintained a ledger of kickbacks he owed to Buendia based on goods he did not deliver with regard to specific purchase orders:

5,936.00	1/13 met w/ tescott	
1,030.00	1/19 7-50000 cnns = 350000 + 400 = 4,900.00	Xn
7372.50	P.O. # 847603 1,342.50	
4162.50	P.O# 848165 1,790.00	
13,746.50	P.O# 849637 9,584.00	
15,147.50	P.O# 850446 1,396.00	
16,538.50	P.O# 850447 1,396.00	
18,334.50	P.O# 850657 1,796.00	
11,278.50	3/17 10-500.00 cnns 5039.52 + 400 = 7056.00	Xn
11,278.50	4/10 met w/ tescott (new lines per month)	
5478.50	5/21 8-500 cnns = 4000 + 400 = 4,400.00	
5478.50	9/1 met w/ tescott	

(Govt. Trial Exhibit 13b, Buendia Encumbered Funds Ledger.)

Buendia regularly withdrew from her “credit” with Shy—who essentially acted like a bank to Buendia—by requesting and accepting prepaid gift cards from Shy to use as she wished. In order to make his kickback payments appear

legitimate, Shy requested that Buendia provide him with letters on Bennett letterhead requesting gift cards, which she willingly and repeatedly did.

Between November 2011 and January 2015, Buendia corruptly solicited and accepted kickbacks, in the form of prepaid gift cards, on numerous occasions. For each of these transactions, Buendia provided a letter to Shy on school stationary asking for amounts ranging from \$775 to \$5,000 in total gift cards with each request. During this period, Buendia accepted approximately \$45,775 in kickbacks from Shy.

**C. Kickbacks Received on February 9, 2015 and May 5, 2015
(Counts 2 and 3)**

In January 2015, Shy began cooperating with the government in its investigation of Buendia and other DPS principals with whom he conspired. To that end, Shy began recording phone conversations and meetings with Buendia. He also turned over emails and other communications from the defendant. Shy's cooperation yielded more proof of Buendia and Shy's illegal kickback arrangement. Buendia left him voicemail messages, and sent text messages and emails, requesting gift cards from Shy. In one email sent to Shy from her personal email account, Buendia directly linked her act of approving purchase orders to being entitled to gift cards from Shy:

From: J Buendia <jlbuendia@msn.com>
Subject: texts
Date: October 27, 2012 6:04:37 AM EDT
To: norm shy <nshy1@sbcglobal.net>

Good Morning Norm,
I have sent a few texts, and not heard back from you. Maybe you're out of town.
I have received on all four POs.
I faxed an invoice for Thread Shed to you. The next time you're around, I was hoping to receive 4 VISA cards and 1 Costco card, each for \$1000.

(*Govt. Trial Exhibit 19b, Email from J. Buendia to N. Shy dated October 27, 2012.*)

In late January 2015, Buendia left Shy a voicemail asking if he been paid by DPS because she wanted gift cards: "Naturally, it's my hope that you are all up to date on your invoicing, but um, I wanted you to know. Give me a call please, when you have a moment. I am curious if you've gotten paid um, because I am hopeful to receive gift cards." (*Govt. Trial Exhibit 28a, January 25, 2015 voicemail from Josette Buendia to Norman Shy.*) This communication and the ones that followed resulted in a meeting on February 9, 2015 between Buendia and Shy that was recorded on video and audio. (*Govt. Trial Exhibit 33a, February 9, 2015 recorded meeting between Josette Buendia and Norman Shy.*) During that meeting, Shy gave and Buendia accepted \$3,000 in prepaid visa gift cards. Because those gift cards were provided to Shy by the FBI, agents were able to track how Buendia used them: regular gas fill-ups at the Sunoco gas station near her home, fast food

purchases, several 90-minute massages, personal car repairs, and nail salon services.

About a month after receiving these gift cards, Buendia once again began texting and communicating with Shy, asking for more gift cards:



(*Govt. Trial Exhibit 37, Screenshots of 3/13/2015 Text Messages from J. Buendia to N. Shy.*)

At this point, Buendia knew that Shy's vendor status with DPS was in jeopardy so during a phone call, she told him she wanted to work out her final balance with him and to "settle up" regarding what he owed her. During this call, Shy told her he was uncomfortable dealing with gift cards because they could be tracked, so Buendia agreed to accept a cash payment. During a recorded meeting on May 5, 2015, Shy counted out \$2,500 in \$100 bills and Buendia accepted gladly and greedily accepted it.

II. SENTENCING GUIDELINE CALCULATIONS

As reflected in the presentence investigation report, the probation department calculated a guideline range of 63 to 78 months based on a total offense level of 26 and a criminal history category of I. The government agrees with the probation department's guideline calculation. The addendum to the presentence report indicates that the defendant did not submit objections.

III. SECTION 3553(a) FACTORS

Through 18 U.S.C. § 3553(a) Congress has provided the relevant objectives and factors to be considered by sentencing courts in imposing a “sentence sufficient, but not greater than necessary.” Those objectives are: (1) the nature and circumstances of the offense, and the history and characteristics of the defendant; (2) the need for a sentence to reflect the basic aims of sentencing (including retribution, deterrence and rehabilitation); (3) the kinds of sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need for restitution. These factors support a sentence of 63 months’ imprisonment.

A. Nature and Circumstances of the Offense

This fraud on DPS and the children of Detroit was a very serious offense. The struggles of DPS have been well documented in the media: deplorable building conditions, teacher shortages, severe lack of school supplies and equipment, overcrowded classrooms, lack of funding. The list is long. As confirmed by the evidence introduced by the defense at trial, Bennett was one of those struggling DPS schools. A former building engineer testified on Buendia's behalf regarding the graffiti, constantly leaking roof, and otherwise dreadful building conditions. Other witnesses for the defense testified about lack of funds for school activities such as enrichment activities and field trips. Buendia, who had been employed by DPS since 1999 as a teacher, assistant principal, and then principal, knew well the ongoing struggles of DPS' schools. Buendia was entrusted with the responsibility of ensuring that the students at Bennett were receiving every educational tool and benefit available despite the woefully inadequate resources. Buendia abused the trust placed in her, and made decisions to do business with vendor Norman Shy, motivated by what she *personally* stood to gain, instead of what was best for her students.

Buendia's unsuccessful attempts at trial to demonstrate that she spent the kickbacks for school purposes, or that she was reimbursing herself for money she spent out-of-pocket for the school, should not be considered by this Court as a

reason to vary downward from the guidelines. Not only were these claims largely unsupported, but Buendia’s characterization of her motivation as altruistic, is simply irrelevant. Although the Sixth Circuit has not confronted this issue, other federal circuits have had the opportunity to address similar arguments. Federal circuit courts have resoundingly declined to consider personal profit motives—or lack thereof—when imposing sentences.

In *United States v. Seacott*, a district court’s departure from the recommended guidelines because the defendant’s motive was not for “self-gain” was reversed. 15 F.3d 1380, 1386 (7th Cir. 1994). Although the district court reasoned that the guidelines did not adequately take into consideration why a defendant would misapply funds, the Seventh Circuit held that an alleged positive motive was “legally insufficient” to warrant a downward departure. *Id.* at 1387. The Court explained that when the drafters of the Guidelines were concerned with adjustment based on profit motive they were careful to specifically direct courts to consider the defendant’s purpose. *Id.*¹ Most importantly, the Court in *Seacott* recognized:

¹ For example, citing the offense “Manufacturing Distributing, Advertising, or Possessing an Eavesdropping Device” which directs the court to consider “[i]f the offense was committed for *pecuniary gain*, increase by 3 levels.” U.S.S.G. § 2H3.2(b)(1) (emphasis added).

It makes little difference to the[] victims if [defendants] illegally transfer funds to themselves or third parties, or if they pile up the money in the parking lot and burn it. The same amount of money has been taken from the victim no matter what the fate of the funds.

Id.

Other circuits have reached similar conclusions, finding that altruistic motive or lack of pecuniary gain to the defendant is irrelevant in sentencing. In *United States v. Corry*, the defendant argued that she did not experience personal gain from the bank fraud she committed since the money was being used to keep a family business afloat. 206 F.3d 748, 749 (7th Cir. 2000). Again, the Court recognized how irrelevant a charitable motive is: “[T]o the victim, the criminal’s motives are irrelevant. If someone steals your wallet and gives the money in it to the Humane Society, rather than blowing it in Las Vegas, that’s little comfort as you gaze at your empty pocket.” *Id.* at 751. In the Third Circuit, the Court recognized that a defendant is not punished based on who the criminal activity benefits, instead “the Court must focus on the extent of the harm inflicted by the defendant on his victims.” *United States v. Kopp*, 951 F.2d 521, 535-36 (3d Cir. 1991). Similarly, the Eighth Circuit held that a failure to personally recoup proceeds of a fraudulent scheme does not “provide a basis for a more lenient sentence.” *United States v. Felder*, 225 F. App’x 423, 424 (8th Cir. 2007).

Accordingly, the alleged motive for a crime and who receives the proceeds of a fraudulent scheme is irrelevant. Although a sentencing court can consider any factor when considering a downward departure or variance, the federal circuits have made clear that a defendant's motive in a crime should not be grounds for leniency. Instead, courts should focus on the victims of the crime, and not any possible benefactors. This is exactly what District Judge Victoria A. Roberts did when sentencing the related 12 DPS principals. Judge Roberts declined to consider any altruistic motives the principals may have had in accepting kickbacks from Norman Shy.

Even if Buendia was accepting fraudulent kickbacks and using the illegal proceeds to help her school, her alleged charity was only made possible by fraud committed against taxpayers and the Detroit Public School System. Should Buendia attempt to downplay the seriousness of her corrupt acts by claiming she accepted and spent kickbacks on her students ignores the fact that her so-called charitable acts were being directly funded by the crime for which she now stands convicted. It also discounts that her illegal arrangement drastically inflated the cost of the school supplies that Shy did actually deliver. For example, consider this scenario: Buendia orders 50 reams of paper for \$1,000. Shy only delivers 25 reams. Buendia certifies that Bennett received 50 reams causing DPS to pay Shy

\$1,000 as indicated on the invoice. The result is that DPS paid Shy twice as much then it should have for the paper Bennett actually received.

This Court should reject any claimed motive for accepting fraudulent kickbacks when considering whether to depart or vary from the Guideline range, and in doing so recognize that charity involves giving away one's *own* money, not money that belongs to others. To find otherwise would sanction the notion that corruptly accepting bribes and kickbacks to spend proceeds as one prefers is not a serious offense.

B. History and Characteristics of Defendant Buendia

Buendia has no criminal history. The PSR provides a detailed account of Buendia's personal background. Of particular note is Buendia's employment history. She was employed by DPS since 1999 as a teacher, assistant principal, and then principal. Buendia certainly knew from personal experience the struggles of DPS from her longtime employment, yet she chose to defraud DPS anyway.

C. Seriousness of the Offense, Promoting Respect for the Law, Providing Just Punishment, and Affording Adequate Deterrence

Buendia's corrupt acceptance of kickbacks was not a crime resulting from a single decision or a momentary impulse. She accepted kickbacks numerous times over several years, totaling over \$45,000. Buendia's conduct was not spontaneous,

but, instead, involved careful coordination and planning, and repeated acts of deceit over a number of years.

In prosecutions such as this, the sentence imposed is important to promote respect for the law. Congress enacted 18 U.S.C. § 666 to “protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery.” S. Rep. No. 98-225, p. 370 (1983). The sentence imposed should reflect this purpose. Buendia was a public official, and was entrusted to serve the DPS honestly, with the best interests of DPS students in mind. The spectacle of a principal corruptly using her position for her own financial benefit or to manipulate the system does untold damage to the faith of our citizens in the education being provided to their children. Members of the community are wondering how pervasive this type of corruption is in our educational system. Buendia’s corrupt acts undoubtedly called into doubt the soundness of DPS’s procurement process. Her crimes also gave further reason for skeptics of DPS to question its needs, financial and otherwise, and its ability to provide for the needs of its students.

Given the difficulties of uncovering and prosecuting this type of corruption, the deterrent impact of a prison sentence is also important. The Eleventh Circuit emphasized the important role that prison sentences have in deterring economic-

based crimes in *United States v. Martin* when it recognized that “[b]ecause economic and fraud-based crimes are more rational, cool, and calculated than sudden crimes of passion or opportunity, these crimes are prime candidates for general deterrence.” 455 F.3d 1227, 1240 (11th Cir. 2006)(internal citations omitted). Especially in a public corruption case, it is important to send a message that this type of conduct will not be tolerated, and that the penalties for committing crimes such as these are severe.

D. Sentencing Disparities

A sentence of 63 months’ imprisonment does not create unwarranted sentencing disparities between Buendia, and the related DPS principals who received sentences ranging from 6 to 36 months, largely depending on the amount of bribes accepted. Buendia’s circumstances are much different. The other principals cooperated with the government, agreed to testify at trial against Norman Shy, and fully accepted responsibility for his or her conduct. Accordingly, the government filed downward departure motions for each of the twelve principals, and they received credit for acceptance of responsibility. Buendia is not similarly situated and her circumstances warrant a guideline sentence.

CONCLUSION

For all of the above reasons, the government respectfully requests that the Court impose a sentence of 63 months' imprisonment for defendant Buendia.

Respectfully submitted,

DANIEL L. LEMISCH
Acting United States Attorney

s/Frances Lee Carlson

FRANCES LEE CARLSON
J. MICHAEL BUCKLEY
Assistant United States Attorneys
211 West Fort Street, Suite 2001
Detroit, Michigan 48226
313-226-9100
frances.carlson@usdoj.gov
michael.buckley@usdoj.gov

Dated: May 24, 2017

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2017, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

Kimberly Stout
Attorney for Defendant, Josette Buendia

s/Frances Lee Carlson
FRANCES LEE CARLSON
Assistant United States Attorney

Dated: May 24, 2017